IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 245 and 247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the assets in New York of Russo-Asiatic Bank,

and

JAMES A. TILLMAN,

Petitioners,

—against—

GUARANTY TRUST COMPANY OF NEW YORK and others.

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITIONS FOR CERTIORARI

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BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is filed in opposition to the separate petitions of James A. Tillman (an intervenor in the above-entitled action) dated August 5 1947, and Messrs. Steingut and Blodgett as receivers of the assets in New York of Russo-Asiatic Bank (substituted plaintiffs in the above-entitled action) dated August 1 1947. The subject-matter of the above-entitled action is the same as the subject-matter of the separate actions brought by the United States against Guaranty Trust Company of New York, in which the undersigned have separately prayed for certiorari by petition dated July 31 1947, Nos. 239 and 240.

Opinions Below

The opinions of the District Court are reported in 58 F. Supp. 623 and 60 F. Supp. 103 (R. 3060, 3106; also R. 3110, not reported). The opinion of the Second Circuit Court of Appeals is reported in 161 F. (2d) 571 (R. 3562).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 3568) was filed May 7 1947. The jurisdiction of this Court invoked by the petitioners rests on Judicial Code §240(a) as amended by the Act of February 13 1925, 28 U. S. C. §347(a), 43 Stat. 938.

Statutes Involved

The Litvinov assignment of November 16 1933, is set forth in this Court's opinion in *United States* v. *Pink,* 315 U. S. 203 at 212.

New York Civil Practice Act §977-b, approved June 10 1936, provides in part:

> "1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do

business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise. . . .

"5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver. . . .

"19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. . . .

"20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible

and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor."

Statement of the Case

Guaranty Trust Company of New York is a New York banking corporation which on December 27 1917, the date of nationalization of the Russian banks by the Soviet Government, held deposit accounts aggregating $1,483,481.36 in the name of Russo-Asiatic Bank, a banking corporation organized under the law of the Russian Imperial Government in 1910.

The above-entitled action, to which petitioners are parties, was brought in equity for an accounting in the Southern District of New York on May 12 1919, by attorneys acting under the authority of the General Manager for the Far East of Russo-Asiatic Bank (R. 17) and also of the Bank's board of directors constituted in Paris after the nationalization of the Bank in Russia (R. 227). Messrs. Steingut and Blodgett, as receivers, were substituted plaintiffs in the action on July 29 1939, having first been appointed June 10 1936 (R. 230). Russo-Asiatic Bank at no time had a branch in the United States and never did business in the United States (R. 224).

Petitioner Tillman intervened in the action by order made in 1936, i.e. while the plaintiff was still Russo-Asiatic Bank (R. 251). He obtained and levied on the Russo-Asiatic accounts with Guaranty Trust Company an attachment in 1927 (R. 249).

Judgment in this action was entered in favor of Guaranty Trust Company against all the petitioners (R. 288). The Second Circuit Court of Appeals affirmed.

In 1933 by the Litvinov assignment the United States claims to have acquired title to the Russo-Asiatic Bank accounts with Guaranty Trust Company. This claim of title, in other words, antedates the appointment of the receivers, their substitution in the action, and the intervention therein of Tillman. Two separate suits at law were brought by the United States to enforce its claim of title; these are described in our petition for certiorari in those actions, Nos. 239 and 240. Attempts by the United States to be substituted for the receivers as plaintiff in the above-entitled action, or in the alternative for a complete and full consolidation of the three actions, failed (R. 216, 254). Instead, the three actions were consolidated for purposes of trial only, and were tried before the same judge, who made common findings and conclusions while granting separate judgments. The judgments in favor of United States against Guaranty Trust Company for a total of $3,202,028.45 are the subject of our petition for certiorari, Nos. 239-240; while the separate judgment in favor of Guaranty Trust Company against the receivers and Tillman (R. 288) are the subject of the separate petitions of the receivers and of Tillman which we here oppose.

POINT I

The Petition of James A. Tillman in No. 247 presents no question worthy of review here and should be denied.

The opinion of the District Court (58 F. Supp. at 642-3, R. 3101-4) which the Court of Appeals in effect adopted, contains a lucid statement of the reasons which deprive Tillman's claim of any foundation whatever. The findings are also specific on the point (R. 249-52). In substance, the record shows without dispute that at the time the United States acquired its claim of title through the Litvinov assignment, viz. November 16 1933, the petitioner Tillman did not have an attachment at all. At that time his warrant of attachment stood vacated by order entered in 1928 on consent in the District Court for the Eastern District of New York, where his case against Russo-Asiatic Bank had at the time been lodged pursuant to removal proceedings (R. 251). A similar order was entered in the New York State Court (R. 251). The order in the State Court was, to be sure, stricken out in 1935, with the effect of restoring the attachment on the record at that time; but this action did not occur until after the United States had acquired its claim of title. The courts below therefore rightly and necessarily concluded that at the date of the Litvinov assignment, whatever might be the liability of Guaranty Trust Company to Russo-Asiatic Bank or its successor, the petitioner Tillman did not have an attachment lien upon the account and he could not thereafter acquire such a lien in view of the dissolution of his alleged debtor, Russo-Asiatic Bank, brought about by the Soviet decrees of 1917 (R. 225).

The conclusion thus reached below is irresistible, and the elaborate discussion in the Tillman petition of the Fifth Amendment, the full faith and credit clause, and property rights conferred by New York Law through an attachment lien skirts and evades the real point.

Moreover, as the findings show (R. 251), the 1928 order of the District Court vacating Tillman's attachment is still in force and the very claim asserted by Tillman that the State Court order of vacatur was in 1935 set aside retroactively (R. 251; petition in No. 247 p. 10), is based upon a proposition quite inconsistent with a valid attachment or a valid default judgment, i.e. the proposition that the attorneys who appeared for Russo-Asiatic Bank on the order vacating the attachment themselves had no authority (R. 251) because Russo-Asiatic Bank must, in the language of the New York Court of Appeals, be recognized as "dead" after the Litvinov assignment made the Soviet decree of dissolution effective in New York. See *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43 (1934).

As a last and controlling reason why the Tillman petition should not be entertained, we may mention the fact that as between Tillman and Guaranty Trust Company it is conclusively adjudicated that enforcement of the attachment lien, if it existed, is prevented by the New York statute of limitations. See R. 252; *Tillman* v. *Guaranty Trust Company*, 276 N. Y. 663.

POINT II

The Petition of the Receivers Steingut and Blodgett in No. 245 presents no issue worthy of review in this Court and should be denied.

The claim of the receivers to a review, while more elaborately presented, is subject to the same fatal defect, as was pointed out by the courts below; viz. that the receivers were appointed in 1936 and derive title from a judgment entered in 1938, in both instances long after the rights of Russo-Asiatic Bank which these petitioners seek to enforce had, under Soviet law, passed to the State of Russia and through Russia to the United States. See the discussion of the District Court at R. 3077, 58 F. Supp. at 633. The fact that the receivers were in 1939 substituted for Russo-Asiatic Bank as plaintiffs in the above-entitled action which had been instituted by the Bank in 1919, is without significance, since this substitution was expressed to be without any implication as to the merits of their claim or the quality of their title (R. 230), and since obviously the receivers are not statutory successors of the Russian bank, but only would-be liquidators of assets outside the corporate domicile.

As against this essential basis of the decision below, the receivers' petition and brief present two claims for consideration here. In the first place, they say that as a matter of proper construction of the Soviet decrees, these decrees did not take assets of Russo-Asiatic Bank in New York (petition in No. 245 p. 22). In reply it is submitted that the contrary construction put upon the Soviet decrees by the courts below whereby the Russian State became the universal successor of the Bank and all its assets every-

where went to the State (R. 225-6; R. 3072, 58 F. Supp. at 632) is the only possible construction on the face of the decrees and on the evidence, as well as being the normal and logical result under any legal system of the dissolution and merger into the State of the corporate entity of Russo-Asiatic Bank.

In the second place, these petitioners urge that, even if the construction of the Soviet decrees made by the courts below were correct, those decrees should not be given effect to transfer to the United States the accounts with Guaranty Trust Company because of the Federal public policy against extra-territorial application of foreign confiscatory or penal laws. This subject is discussed, and this ground is asserted by us as independent basis for review, in our petition in the separate actions of the United States, Nos. 239 and 240 (brief p. 27). However, the receivers as petitioners do not stand in the same position as Guaranty Trust Company with reference to the assertion of this public policy.

Guaranty Trust Company as petitioner asserts the claim of right of an American national (R. 223) by virtue of a set-off which it made against the accounts in suit in 1918 (R. 243-5). The receivers occupy no such position. While they purport to assert the rights of American creditors (petition in No. 245 pp. 11 ff.),[1] they are not creditors in their own right; they act under appointment of a court outside the corporate domicile subsequent to the Litvinov assignment; and the inconsistency of their claim as would-be liquidators with the claim of the United States as statu-

1 In fact one of the principal claims they seek to represent is of Chinese nationality, as conceded in the petition at p. 15; while another is that of National City Bank, and is not conceded by that American national to be in reality represented by the receivers and has been held by the State Court to be adverse and superior to the claim of the receivers. *Grant* v. *Steingut*, Supreme Court, Richmond County, New York Law Journal March 17 1942 (not officially reported).

tory successor, has already been pointed out by this Court. In *United States* v. *Pink,* 315 U. S. 203 (1942), these very petitioners filed a brief as friends of the Court in which they advanced contentions similar to those now asserted in No. 245 and with respect to which this Court said, in upholding the title of the United States (p. 231) with citation of New York Civil Practice Act, §977-b:

> "Enforcement of New York's policy as formulated by the *Moscow* case would collide with and subtract from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization."

Plainly, the receivers petitioners in No. 245 are mere custodians or stakeholders like the defendant Bank in *United States* v. *Belmont,* 301 U. S. 324. They have no right or title of their own, and cannot invoke here the protection of Federal public policy in the same way as Guaranty Trust Company, petitioner in Nos. 239 and 240.

An independent ground for denial of certiorari to the receivers is that their only claim of title rests upon a judgment entered in 1938 in an action set up as one *quasi in rem,* and that such judgment is necessarily void because of the prior dissolution of the defendant Russo-Asiatic Bank. *In re Peer Manor Building Corporation,* 134 F. (2d) 839, 840, cert. den. 320 U. S. 211. The point is illustrated in the present context by the decision of the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank* [1933] A. C. 289, affirming [1932] 1 K. B. 617. In that case the Court dismissed an attachment upon the funds of Moscow Industrial Bank on deposit with the Midland Bank which had been obtained in 1930 and made the basis of a default judgment. Lord

Wright, [1933] A. C. at 296, points out that a judgment must be set aside as a nullity as soon as it is shown that the judgment-debtor was at all material times non-existent and that for similar reasons a garnishment based on the mailing of a summons is void.

POINT III

The fact that Guaranty Trust Company is entitled to the writ of certiorari pursuant to its Petition in Nos. 239 and 240, is no reason for granting the Petitions sought by Tillman, Steingut and Blodgett.

As has been said, the three actions against Guaranty Trust Company, i.e. the above-entitled suit in equity for an accounting which was dismissed and the subsequent actions at law by the United States in which a recovery was directed, were tried together and made the basis of common findings and conclusions. The record to which reference is here made is the combined record in the Court of Appeals made upon consent of counsel. Yet separate judgments were entered in the three cases, and their separation has always been recognized, for the reasons expressed in *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 496.

It has just been shown that neither the petition of the receivers nor that of Tillman raises any question of substance or of general interest. In fact, neither petition shows that the adverse result is in conflict with the law of any other Circuit or with the law of this Court. The fact that in Nos. 239 and 240 we have stated questions in respect of which the decisions below are in conflict with the law of this Court and the law of New York, does not authorize the issuance of writs in the separate case above entitled. The presentation and consideration of the questions raised in

Nos. 239 and 240, will be facilitated by the denial of the writs prayed in the instant case, just as the presentation and consideration of these questions below was impaired and confused by the injection of the unmeritorious points discussed in the receivers' and Tillman's petitions.

CONCLUSION

No important question of federal law and no inconsistency of decision either with this Court or with other circuits are presented in Nos. 245 and 247, and the writs therein prayed should therefore be denied.

Respectfully submitted,

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New York, September 9, 1947.